No. 71-695

In the Supreme Court of the United States

OCTOBER TERM, 1971

FRANK L. SILVERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

JOHN P. BURKE,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-695

FRANK L. SILVERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 56-67) is reported at 449 F.2d 1341. The opinion of the district court denying the motion to suppress evidence (Pet. App. 68-78) is reported at 311 F. Supp. 485.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1971, and the petition for a writ of certiorari was filed November 23, 1971. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, there was reversible error because one of the jurors could not read or write English.

2. Whether the admission of evidence resulting from the inspection of certain closing statements filed with state judicial authorities violated the Fourth or Fifth Amendments.

3. Whether the jury was permitted to examine summary charts prepared and introduced into evidence by the government without proper instructions as to their use.

4. Whether there was a fatal variance between the indictment and the bill of particulars supplied by the government.

5. Whether one count of the five-count indictment was barred by limitations.

6. Whether the evidence was sufficient to support the verdict.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The relevant constitutional provisions, statutes and rules involved are set forth at Pet. 4-10.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on five counts of willfully at-

tempting to evade income taxes for the years 1961 through 1965, in violation of Section 7201 of the Internal Revenue Code of 1954, and was sentenced to concurrent one-year sentences on each count. The court of appeals affirmed (Pet. App. 56-67).

The material facts are largely undisputed, and are set forth fully in the opinion of the court below. During the relevant years, petitioner was engaged in the practice of law. The proof established that, in each of the five years involved, petitioner either totally excluded from his tax return, or understated, his professional income, capital gains, interest, dividends and commissions. The disparities between petitioner's reported and true taxable income for each year were summarized as follows (Govt. Ex. 222):

Year	Reported Taxable Income	Actual Taxable Income	Unreported Taxable Income
1961	$ 4,324.47	$ 26,798.15	$22,473.68
1962	5,947.27	18,022.90	12,075.63
1963	8,872.55	18,714.62	9,842.07
1964	10,739.27	16,554.87	5,815.60
1965	10,593.28	31,779.32	21,186.04
TOTALS	$40,476.84	$111,869.86	$71,393.02

The government's proof was based in part on an examination of certain "closing statements" that petitioner filed in contingent fee cases with state judicial authorities pursuant to court rule, disclosing the compensation received by him. These statements are confidential, but may be made available for inspection by court order. Such an order was obtained by the Internal Revenue Service here. Petitioner's pre-trial motion to suppress the evidence thus obtained, on

grounds that its use would violate the Fourth Amendment and the privilege against self-incrimination under the Fifth Amendment, was denied in a comprehensive opinion by the trial judge (Pet. App. 68-78; 311 F.Supp. 485).

On the day the jury rendered its verdict, the forelady advised the trial judge that one of the jurors, a Mrs. Altman, could not write English, and asked how Mrs. Altman should render her verdict. The trial judge suggested that she do so orally, and the guilty verdict followed. No objection was filed then, but six days later petitioner moved to dismiss the indictment or for a new trial because Mrs. Altman was not qualified to serve as a juror. At the ensuing hearing, it was discovered that Mrs. Altman's juror qualification form, which she had completed with her attorney's assistance, indicated that she could not read or write English, though this information was not discovered until after trial. It was established that Mrs. Altman had no difficulty in speaking and understanding English and could read numbers, as the trial judge had determined after a personal examination of each juror (214A-215A).[1] The trial judge accordingly denied petitioner's motion.

ARGUMENT

1. The courts below correctly held that there is no substance to petitioner's "basic" contention, that his conviction was invalid because Mrs. Altman could not read or write English (Pet. 18-28).

---

[1] References to page numbers followed by the letter "A" are to the appendix in the court below.

While Mrs. Altman stated this fact in her juror qualification form, she nevertheless was called to serve and her inability to read and write English was not known until the day of the verdict. When this fact was brought out, no objection was made until six days after the verdict. In this circumstance, even if Mrs. Altman did not satisfy the statutory qualifications under 28 U.S.C. 1865, as petitioner contends, his conviction is not invalid on that ground alone. For as the court below noted (Pet. App. 58-60), the applicable statutory procedure (28 U.S.C. 1867) "clearly requires that a challenge on this ground be made at or before the voir dire" (Pet. App. 59).

Nor is there any other reason to invalidate petitioner's conviction on this account, since the inclusion of Mrs. Altman on the jury was not prejudicial to him. See *Jackson* v. *United States*, 408 F. 2d 306, 309 (C.A. 9); *Ford* v. *United States*, 201 F. 2d 300, 301 (C.A. 5); *United States* v. *Rosenstein*, 34 F. 2d 630, 634 (C.A. 2). Petitioner did not dispute the fact that his tax returns substantially understated his taxable income. His defense was that he had delegated the handling of his tax matters to his wife, and that as a result the requisite "willfulness" was not present. But as the court below pointed out, Mrs. Altman, who had lived in the United States for 44 years, had "no difficulty at all in understanding the oral testimony," and "could weigh and consider this evidence [relating to willfulness] quite as well as any other juror" (Pet. App. 61). These facts provided ample basis for the court's conclusion that petitioner "was not prejudiced by reason of Mrs. Altman's inability to read and write English" (*ibid.*).

2. The introduction into evidence of the closing statements indicating petitioner's compensation from contingent fees did not violate his Fourth and Fifth Amendment rights.

The examination and copying of the statements by Internal Revenue Service agents did not violate petitioner's Fourth Amendment rights, since the statements neither belonged to him nor were in his possession at the time. Thus, the courts below correctly held that petitioner could not object on Fourth Amendment grounds. See *Alderman* v. *United States*, 394 U.S. 165, 171-172.

Similarly, there was no deprivation of petitioner's privilege against self-incrimination under the Fifth Amendment. The filing of the statements, though compulsory, had no relevance to petitioner's criminal conduct; on this basis, the courts below properly found that *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, were "completely inapposite" (Pet. App. 64; see *id.* at 72-75). In these circumstances, it is clear that petitioner was not compelled to incriminate himself. Moreover, the closing statements were "required to be kept pursuant to a reasonable regulatory scheme [and thus] have 'public aspects' and may be examined for evidence of criminal conduct" (Pet. App. 64). *Shapiro* v. *United States*, 335 U.S. 1, 32-35; see also *California* v. *Byers*, 402 U.S. 424.[2]

---

[2] Cf. *Hill* v. *Philpott*, 445 F. 2d 144 (C.A. 7), certiorari denied, No. 71-442, December 14, 1971, where the matters seized, unlike the statements here, were the personal records of the person from whom they were seized.

3. There is no substance to petitioner's claim (Pet. 41-46), which in any event he failed to raise at trial, that the trial judge erred in permitting the jury to examine the government's summary charts of alleged unreported income and tax deficiencies. It is well settled that such charts and summaries are admissible evidence in income tax evasion cases like this. See *United States* v. *Johnson*, 319 U.S. 503, 519-520. The record belies the contention that the summaries were given to the jury without proper instructions as to their use; such instructions were given twice, when the summaries were offered and again when the jury asked for them during its deliberations (see Pet. App. 66; 214A).

4. There was no significant variance between the government's bill of particulars and the indictment, contrary to petitioner's assertion (Pet. 46-49). The original bill of particulars incorrectly listed as gross income for each taxable year the same figures which the indictment correctly listed as taxable income. But the government subsequently furnished petitioner "with detailed and correct schedules after having served the [original] bill of particulars and months before the trial" (Pet. App. 65), and thus, as the court below held, the error in the original bill was not prejudicial. See *United States* v. *Glaze*, 313 F. 2d 757 (C.A. 2).

5. Count I of the indictment was not, as petitioner contends (Pet. 49-50), barred by limitations. As the court of appeals ruled, the indictment was filed within the period specified by the applicable statute (Pet. App. 66-67). The case on which petitioner relies

(*United States* v. *Habig*, 390 U.S. 222) is not controlling here; unlike the returns in *Habig*, which were filed after the normal filing date, the return in question here was filed before the due date and thus the pertinent time period is that specified in the statute.

6. Petitioner's final argument that the government failed to make out a prima facie case (Pet. 50-55) is, as the court below held, insupportable, since "[t]he record presents ample proof" of petitioner's guilt (Pet. App. 67). The government established substantial understatements of taxable income for each year, totalling $71,393.02. The jury could properly infer that this was willfully done from petitioner's consistent pattern of understating large amounts of income and failing to state all his income on his books and records. Compare *Holland* v. *United States*, 348 U.S. 121, 139.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

JOHN P. BURKE,
RICHARD B. BUHRMAN,
Attorneys.

JANUARY 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 453898 408